



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
RODOLFO D. ESPINOZA,)	
)	
Complainant,)	
)	Charge No.: 2000CF1153
and)	EEOC No.: 21BA00570
)	ALS No.: 11395
NORTHWESTERN UNIVERSITY,)	
)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

On October 12, 2000, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Rodolfo D. Espinoza. That complaint alleged that Respondent, Northwestern University, harassed Complainant on the basis of his national origin.

On August 27, 2001, this matter was scheduled for public hearing. After the hearing was formally opened, Complainant refused to proceed and moved to continue the case so that he could pursue his remedies in federal court. Complainant did not provide any notice to Respondent of his intent to seek a continuance, and Respondent objected to the motion. The ruling at the time was that the case would be stayed to allow Complainant to pursue his federal remedies, but that it would be recommended that he compensate Respondent for the expenses incurred as a result of Complainant's failure to provide notice

of his refusal to go forward. Pursuant to that ruling, Respondent filed a motion for fees and Complainant filed a written response to that motion.

The matter now comes on to be heard on Complainant's motion to dismiss the case with prejudice. Respondent has not objected to the motion. The matter is now ready for decision.

FINDINGS OF FACT

The following facts were derived from the record in this matter and statements made during hearings on motions, including the transcript of the proceedings of August 27, 2001.

1. On August 13, 2001, Complainant filed his Emergency Motion for Continuance of Public Hearing. That motion was denied after a hearing on August 16, 2001.

2. Both parties were given proper notice of the public hearing scheduled for August 27, 2001. Said hearing was scheduled on April 25, 2001.

3. Both parties were present on the afternoon of August 24, 2001 to argue Respondent's motion to quash Complainant's subpoenas. Said motion was granted.

4. After the hearing was officially opened, Complainant moved for a continuance to take the matter to federal court. He refused to proceed further. He made the decision not to proceed no later than the afternoon of August 24, 2001.

5. Complainant did not give Respondent any advance notice of his intent to seek a continuance. As a result, Respondent's

attorneys spent time over the prior weekend preparing for the hearing. They arrived at the scheduled time for the hearing accompanied by several witnesses.

6. Complainant stated at the August 27, 2001 hearing that he did not file any motion to continue because his last motion had been denied and he "figured that there was no point in even presenting another one."

7. On August 31, 2001, Complainant filed a motion to dismiss his complaint without prejudice. That motion was denied on the ground that there is no such authority in the Commission's procedural rules.

8. Complainant has been informed from the bench that dismissal of the complaint with prejudice will prevent him from ever being able to pursue this matter again before the Human Rights Commission.

9. Complainant has been informed from the bench that this matter has been stayed to allow him to pursue his federal remedies and that dismissal of the complaint is not necessary for him to take his claim to federal court.

10. Respondent has requested compensation for the work of attorney Bruce W. Melton at the rate of \$247.50 per hour for 29.90 hours.

11. Respondent has requested compensation for the work of attorney Peter G. Land at the rate of \$171.00 per hour for 19.00 hours.

12. Complainant has represented that his financial condition is such that he is unable to pay the total fees requested in this matter by Respondent.

13. The requested hourly rates are reasonable and should be accepted.

14. The requested number of hours is unreasonably high under these circumstances. The number of hours should be reduced to 2.5 hours per attorney.

CONCLUSIONS OF LAW

1. Complainant's failure to give notice of his intention to seek a continuance unreasonably delayed this matter and caused Respondent to incur unnecessary expense.

2. Under controlling Commission case law, Complainant's actions require an appropriate sanction. Refusal to apply such a sanction would be an abuse of discretion on the part of the administrative law judge.

3. This complaint in this matter should be dismissed with prejudice even though such dismissal with prejudice will prevent Complainant from ever pursuing this matter further in this forum.

4. The underlying charge in this matter should not be dismissed at this time, so that Complainant can pursue his claim in federal court.

DISCUSSION

This matter comes on to be heard on Complainant's motion to dismiss with prejudice. Normally, such a motion would not result

in an extensive written recommendation. In the instant case, though, there is a recommendation that Complainant pay some of Respondent's attorney's fees. That recommendation requires some explanation.

On April 25, 2001, Administrative Law Judge David J. Brent entered an order that scheduled this matter for public hearing on August 27, 2001. Both parties were given proper notice of that hearing.

On August 13, 2001, Complainant filed an Emergency Motion for Continuance of Public Hearing. That motion was denied after a hearing on August 16, 2001.

Both parties were present on the afternoon of August 24, 2001 to argue Respondent's motion to quash Complainant's subpoenas. Said motion was granted.

August 24 was a Friday. The following Monday, August 27, was the scheduled date for the public hearing in this matter. After the hearing was officially opened, Complainant moved for a continuance to take the matter to federal court. He refused to proceed further. Complainant gave Respondent no notice of his intent not to proceed. When asked about the lack of notice, Complainant stated that he did not file any motion to continue because his last motion had been denied and he "figured that there was no point in even presenting another one." He conceded that he had decided on Friday afternoon not to go forward.

As a result of Complainant's failure to give notice of his

intentions, Respondent's attorneys spent time over the weekend preparing for the hearing. Moreover, they arrived at the scheduled hearing accompanied by several witnesses, all of whom had been pulled away from their normal duties.

In other words, Complainant knew on Friday, August 24 that he would not be going forward on Monday, August 27. Despite that knowledge, and despite actually being in the presence of Respondent's attorneys while he had that knowledge, Complainant kept his intentions secret until after the opening of the hearing on August 27. He offered no good reason for his actions and, because of those actions, Respondent incurred substantial attorney's fees and Respondent's witnesses were substantially inconvenienced. That course of conduct requires an appropriate sanction.

There is no doubt that Commission case law requires a substantial sanction. That was made clear in ***Virkler and MCI Telecommunications Corp.***, ___ Ill. HRC Rep. ___, (1995CA2460, August 3, 2000). In ***Virkler***, shortly before the public hearing, the complainant moved for a stay so he could take his claim to federal court. That motion was denied because it came so soon before the scheduled hearing. The complainant then appeared for the public hearing, but made only a cursory attempt to prove his case. He testified on his own behalf, but made no effort to call other witnesses because he did not want to have to duplicate his federal court efforts. Moreover, he elected not to file an

ordered posthearing brief because he preferred to have his claim considered by the federal court. Meanwhile, the respondent had to incur its own attorney's fees by filing a posthearing brief.

The administrative law judge in the **Virkler** case denied the respondent's motion for sanctions, but a panel of the Human Rights Commission reversed the judge's ruling. According to the panel's decision, under those circumstances, the judge's ruling was an abuse of discretion. The panel noted that a dismissal at the Commission would not jeopardize the complainant's right to proceed in the federal court. In addition, once the complainant opted not to make a genuine effort to prove his case, there was no way that there would be a basis for the judge to rule in his favor. In effect, by not moving to dismiss the case at that point, the complainant engaged in conduct which unreasonably delayed the proceedings, in violation of section 5300.750(e) of the Commission's procedural rules. The Commission ordered that the complainant pay all of Respondent's attorney's fees, costs, and expenses after the point at which the complainant made the decision not to try to win the case.

The parallels between the instant case and **Virkler** are clear. Both cases had complainants who chose not to try to win in this forum in order to take their claims to federal court. Both cases should have been dismissed earlier than they were. Both cases had respondents who incurred unnecessary expenses because of the complainants' unreasonable actions. As a result,

both cases require appropriate sanctions.

The complainant in **Virkler** had an attorney, while Complainant in the instant case has been proceeding *pro se*. That fact, though, has no bearing on this decision. A *pro se* litigant is held to the standard of an attorney. **First Illinois Bank & Trust v. Galuska**, 155 Ill. App. 3d 86, 627 N.E.2d 325 (1st Dist. 1993). Thus, the holding in **Virkler** is controlling, and denial of a sanction would be an abuse of discretion.

Accordingly, the only remaining issue is the size of the sanction. Respondent filed a petition for attorney's fees. In that petition, Respondent requested compensation for the work of attorney Bruce W. Melton at the rate of \$247.50 per hour for 29.90 hours. In addition, Respondent requested compensation for the work of attorney Peter G. Land at the rate of \$171.00 per hour for 19.00 hours. If those requests were granted, the total sanction would be \$10,649.25.

Complainant did not specifically oppose the requested hourly rates or the requested number of hours. He did, however, offer evidence that Respondent's fee request far exceeds his ability to pay. Given that evidence, it is clear that granting Respondent's request in its entirety would overwhelm Complainant's finances. Such an outcome would not be just.

Moreover, many of the tasks performed by Respondent's attorneys (such as preparing for Complainant's cross-examination, researching evidentiary issues and discussing hearing strategy)

are tasks that will be necessary in the federal proceeding anyway. Thus, those tasks were not unnecessary. They just were not necessary *at this time*. Having performed those tasks now, the attorneys will save time later.

There was, of course, considerable time that definitely was wasted because of Complainant's actions. That time includes research on specific Commission case law, attendance at the August 27 hearing, and preparation of the petition for fees. (It should be noted that the petition itself does not include its preparation time or the time and expenses of the witnesses who set aside their normal duties to attend the hearing.) Compensation for all of that time, though, likely would be devastating to Complainant's finances.

After careful consideration of the parties' situations, it is recommended that Complainant compensate Respondent for 2.5 hours of each attorney's time. Using the requested hourly rates, that would amount to a sanction of \$1,046.25. That amount is less than 10% of the requested total, and should be large enough to comply with the spirit of the **Virkler** decision while not overwhelming Complainant financially.

Aside from the inclusion of the recommended sanction, there is no just reason to deny Complainant's motion. He has been informed that dismissal of the complaint with prejudice will prevent him from ever being able to pursue this matter again before the Human Rights Commission. He also has been informed

that this matter has been stayed to allow him to pursue his federal remedies and that dismissal of the complaint is not necessary for him to take his claim to federal court. Despite that knowledge, he prefers to have his complaint here dismissed with prejudice, and it is recommended that the Commission grant that request. The underlying charge, however, should not be dismissed, so there will be no question about his right to seek relief in the federal court.

RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered with the following provisions:

A. That Complainant pay to Respondent the sum of \$1,046.25 as a sanction for unreasonable conduct;

B. That the complaint in this matter be dismissed in its entirety, with prejudice;

C. That the underlying charge of discrimination not be dismissed, so that Complainant can pursue his remedies in federal court.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: March 28, 2002